No. 20074

IN THE

United States Court of Appeals For the Ninth Circuit

K-91, Inc.,
Appellant,

v.

Gershwin Publishing Corporation, et al.,
Appellees.

Appeal from the United States District Court for the Western District of Washington, Northern Division

Honorable Gus J. Solomon, *Chief Judge*

REPLY BRIEF OF APPELLANT

Ronald A. Murphy
Attorney for Appellant
K-91, Inc.

Office and Post Office Address:
1010 1411 Fourth Avenue Building
Seattle, Washington 98101

METROPOLITAN PRESS SEATTLE, WASHINGTON

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SUMMARY OF APPELLANT'S REPLY ARGUMENT

After reading appellees' answering brief we have again searched it for case authority. We have, for all practical purposes, found none. Those few cited are analyzed in Appendix A. Appellant challenged appellees to distinguish the cases cited by appellant. But, presumably because appellees could not meet the challenge, they ignore the cases entirely.

Similarly, appellees almost entirely ignore making any reference to the record below. Rather, they refer repeatedly to the trial court's findings and conclusions.

It is these findings and conclusions from which appellant is appealing. As appellant demonstrated in its opening brief, the trial court's findings and conclusions in this type of proceeding carry practically no weight at the appellate level (Appellant's Brief, p. 34). For recent authority in an anti-trust case squarely in point see *Associated Press v. Taft-Ingalls Corporation,* 340 F.2d 753 (6th Cir. 1965), at page 765:

> "It is our obligation as an appellate court to overrule the 'clearly erroneous' findings of the district court in an anti-trust case, as in other civil actions tried by a district judge without a jury."

Appellees acquiesce in this, but repeatedly assert in effect that the trial court's findings are sustained because the trial court found them and that proves them. This reply brief will not just repeat appellant's previous arguments. They have been set forth and gone unanswered. Appellant will reply to appellees' arguments but without much additional reference to the cases or record because these are adequately supplied in appellant's brief.

VIOLATIONS OF WASHINGTON STATE STATUTES

The Power of States to Regulate Pooling of Copyrights

Appellant in its opening brief reviewed Ascap's own extensive litigation on the exact issue of state power to legislate in the area of musical copyright combinations (appellant's brief, 15-17). Appellee declined to even mention these cases, let alone analyze them, and cites such remote cases as labor disputes. Those cases are reviewed in Appendix A herein. We can only assume

that, like the federal anti-trust cases, appellees cannot distinguish them, and so ignore them.

Appellees' Arguments That Per Program Licenses Are Really Per Piece

Appellees contend that they satisfy the per piece requirements of the Washington law because of the Ascap per program license. They say that, for some unexplained reason, it would be difficult to establish a price for each piece of music. They make this contention without the basis of *any* evidence whatsoever. The *only* evidence, coming from several witnesses, was that it would be quite feasible to list the price of music. This evidence is set forth in appellant's opening brief in Appendix H. In *U. S. v. Loew's, Inc.*, 371 U.S. 38, 9 L.Ed.2d 11 (1962), the Supreme Court rejected the identical argument and demanded that each film be quoted at a set price.

Appellees relate that the same price should not be charged for "A La Cubana" as for "Easter Parade." That is precisely our point. The price should be on a per piece or per play basis as the Washington legislature demanded—not on gross. When the consumer buys a phonograph record from the record store he pays various prices for various records—competitively—as it should be. The same should be true for performance rights. In order to buy a phonograph record the consuming public doesn't have to pay 8 per cent of its gross income regardless of which record is purchased. But, under the Ascap per program license, if a broadcaster grosses $50

for a one-hour program in which one record is played, he must pay $4 (8 per cent of his gross) whether the record is "A La Cubana" or "Easter Parade." Or whether 30 seconds of music is played or 59 minutes.

It was obviously this precise evil which the Washington legislature had in mind when it outlawed blanket licenses per se. It then went on to require per piece licenses *as a condition* to allowing composers to pool their performance rights. (RCW 19.24.020) *But it did not make blanket licenses legal.*

Appellees admit that Ascap uses blanket licenses in Washington. Thus they are violating RCW 19.24.020 without regard to the question of whether a per program license is "per piece."

Appellees argue that the Washington legislature must have meant per program when it said "per piece." The Washington legislature said just what it intended to say, "per piece." If it had intended to say "per program" it would have. Even in 1937 we can assume the legislature knew the difference between a piece of music and a radio program. Some of the most popular radio *programs* of the general era were made up of several *pieces*, e.g., The Hit Parade, The Fred Waring Program, The Telephone Hour.

The legislature expressly *defined* what it intended by the phrase "per piece" as being ". . . so much money per each time a piece of music is played or used in a public performance for profit" (RCW 19.24.140).

Appellees also contend that per program licenses should be construed to be per piece licenses within the meaning of the Washington law because the Amended Final Judgment requires Ascap to issue a per program license. Apparently appellee thinks that when a defendant (Ascap) is caught violating the federal anti-trust laws and enters into an agreed order, that comity requires a different interpretation of a state law—some kind of retroactive legislation by two non-legislative groups located in the state of New York. The consent decree was entered in 1941, four years after the Washington law was enacted.

Although appellees keep stating that the Amended Final Judgment is everyone's delight, the simple fact is that only the U. S. Justice Department and Ascap's management have any standing to question its wisdom. Disenchanted rank and file members of Ascap have attempted to intervene, but the United States Supreme Court ruled it was a matter between only Ascap and the government and no one else has any voice in it. *Sam Fox Publishing Co. v. United States*, 366 U.S. 604 (1961). (Appellant's Brief 115-119.) When the All Industry Committee attempted to get different licenses from those provided in the consent decree, the broadcasters were told the same thing. *United States v. Ascap*, 331 F.2d 117 (2d Cir. 1964).

It is preposterous to argue that a decree which binds only Ascap, which no one else has any standing to contest, which is not even a law but a judgment, which can be and has been amended from time to time, has any-

thing whatever to do with the interpretation of a Washington statute. Are we to assume that each time that Ascap agrees to another amendment of the Amended Final Judgment that a 1937 Washington law is to have a different interpretation?

Appellees also contend that not only the state legislature meant to say "per program" instead of "per piece" in 1937, but that the legislature's legal advisor in 1962 was wrong when he issued an opinion to a state senator that the Ascap per program license was another form of blanket license and therefore illegal (Def. Ex. A-14). In so doing, appellees will have to include Ascap's own chief attorney who testified *under oath* before Congress on at least two occasions that the per program license was only another form of blanket license. (Testimony quoted at page 45, Appellant's Brief.)

Finally, appellees contend that they comply with the Washington statute because all members of Ascap under the Amended Final Judgment are free to deal separately. It is a stipulated fact that this is *an impossible alternative* (R. 30, Agreed Fact 50, pp. 10-11). Even if it were possible in Washington, the members do not offer licenses individually.

It is again a *stipulated fact* that the *only* licenses made available are those contained in the files of the Washington Secretary of State (R. 30, Agreed Fact 25 and 28, p. 6). The *only* licenses filed there are the per program and blanket licenses as far as the broadcasters are concerned. There are per piece licenses available to every

other user of music in Washington (Def. Ex. 7, 8, 8-A, Schedule 11), but broadcasters are *expressly excluded.* As previously pointed out, no other users of music are licensed in the State of Washington or pay any fees whatsoever (R. 30, Agreed Fact 21, p. 5).

Appellees even admit in their brief that the only licenses made available by the individual Ascap members to broadcasters are the "per program" and "blanket" licenses when they say any filing the members might make with the Secretary of State would be a duplicate of the filing made by Ascap for its members (Appellant's Brief, p. 25).

Notwithstanding the terms of the Amended Final Judgment, in Washington the individual members of Ascap do not make individual licenses available. As to the rest of the United States, the assertion that they stand ready to deal is an empty platitude. *The fact is that there are no such licenses in existence* (R. 30, Agreed Fact 60, p. 11).

The 1959 Proceedings Before Judge Ryan

Appellees state that the most important single fact in this case was the 1959 proceedings before Judge Ryan. Appellant fails to see that it is of much significance at all. Appellant was not even a party. However, since appellees find it so all-important, appellant feels compelled to comment.

As usual, rather than cite what the facts are, appellees cite the trial court's interpretation. They quote the trial

court's finding that in 1959 Judge Ryan ruled that, in the circumstances presented, Ascap would not be required to issue licenses in Washington. The *stipulated facts* (R. 30, Agreed Fact 73, p. 13) and Judge Ryan's order recites (Pl. Ex. 12) that, when the Washington broadcasters applied to that court for a reasonable license fee pursuant to Section IX, Ascap *refused* to issue them any licenses whatsoever. Not only the petitioners were refused a license, but everyone else in the whole state —even those broadcasters that appellees admit have faithfully paid tribute to Ascap over many years.

Appellees repeatedly assert that appellant had at all times the right to apply for a blanket or per program license under the Amended Final Judgment. For the many reasons related in appellant's two briefs it, of course, declined to do so. (See *Hazeltine Research, Inc. v. Zenith Radio Corporation,* 239 F. Supp. 51 (1965) at 72, where the court holds that one may properly refuse to take a license when the alternatives are coercive.) Now, add to those facts the 1959 proceedings and we find that when an application was made, Ascap demonstrated its immense power by refusing *anyone* licenses, subjecting all users of music to possible damages of up to $5,000 per performance. If the 1959 proceedings are important at all, *those* are the reasons, not what Judge Ryan thought about the effect of the Washington law in an order submitted to him under great distress and intimidation.

If Ascap was guided by the 1948 Attorney General's opinion, as appellee asserts, and the trial court "found,"

why did Ascap pull all of its music out of Washington in 1959—even as to broadcasters who religiously paid? Why has it never licensed any other music user in this state?

Since appellees make such an issue out of appellant's failure to pay Ascap even now, may we remind appellees that that is exactly what this litigation concerns. (Again, see *Hazeltine Research, Inc., v. Zenith Radio Corp., supra.*) The damages in this suit come to less than the cost of printing appellant's two briefs. What is important to appellant is that broadcast music be freed for competitive pricing as was done in *Alden-Rochelle v. ASCAP*, 80 F. Supp. 888 (S.D. N.Y. 1948), for movie performances. (Since appellees went off the record to inform the Court as to appellant's present status of license payments, appellant has taken the liberty of completing the story in Appendix B.)

One more critical factor bears on the importance of the 1959 order to the present case. That order only approves the forms of licenses that were attached to the order. The licenses affixed to the order provide by their own terms that they must be construed under the laws of *New York* (Pl. Ex. 12, 6; Def. Ex. 7). Relying on this, in the Washington State Superior Court action in Yakima, Washington, *Cascade Broadcasting Co. v. Ascap*, Cause No. 45877, Ascap contended that the licenses signed by Cascade Broadcasting Co. (a 1959 petitioner) should be construed under the laws of New York rather than the laws of Washington. The Washington court properly held, however, that

> ". . . the laws and decisions of the State of Washington are applicable to the agreements between the parties any provisions in said agreements notwithstanding." *Cascade Broadcasting Co. v. Ascap*, Superior Court Cause No. 45877, County of Yakima, Washington.

The court relied on *Carsten Packing Company v. So. Pac. Ry.*, 58 Wash. 239, 108 Pac. 613 (1910), that parties may not circumscribe the public policy of a state by conveniently agreeing that another state's laws apply. Therefore, the Washington courts have made the 1959 order a nullity because the licenses approved by the order *must* be construed under Washington laws and *not* under New York laws as Ascap might like.

Lastly, how appellees can say no Washington official has criticized Ascap's filings is puzzling, to say the least, in view of the Attorney General's opinion of 1962 that the per program was really a form of blanket license and illegal, making the only two licenses offered in Washington illegal (Def. Ex. A-14).

Appellees find comfort in the fact that neither they, nor Ascap, or Washington broadcasters who deal with Ascap, have been prosecuted. We assume they found the same comfort between the original Final Judgment in Civil Action No. 13-95 when the Justice Department took no further action until the *Alden-Rochelle* cases and *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843 (D. Minn. 1948), in which Ascap was found to be guilty of antitrust and copyright abuses in nearly every aspect of Ascap's operation despite the 1941 decree. The Justice

Department did not move in on Ascap, just as it does not now, and just as Washington officials have declined to do. But that doesn't make it right or legal, as *Alden-Rochelle* and *Witmark* so amply demonstrate. More important, the argument that failure to prosecute is persuasive of anything at all in the present case is not worth further comment. If public prosecutors were infallible, Congress would not have provided for private rights of action in the anti-trust law.

THE AMENDED FINAL JUDGMENT

Appellees' central argument on the federal issues of anti-trust violations and abuse of their copyrights is to ignore the cases appellant cites and hide behind the consent decree. Their main thrust is that the high-sounding words of the consent decree guarantee competition and fair play for all. All users of music, they keep saying, are guaranteed equal treatment and protection.

Then may we ask why—if the consent decree guarantees all of these things—broadcasters in the United States pay more than 87 per cent of Ascap's total revenues and less than 13 per cent (R. 30, Fact 48, p. 9) is paid by all other users combined, which include all bars, grills, taverns, night clubs, restaurants, seasonal resorts, lounges, occasional or one night bands, dance halls, roller skating rinks, ice skating rinks, rodeos, wrestling, ice hockey, roller derbies, walkathons, professional football and basketball, fashion shows, wired and recorded music not cleared at the source, dog tracks, horse tracks, amusement parks, carnivals, music in industry,

circuses, sound trucks, home shows, expositions, picnic groves, boats, popular concerts, extravaganzas, western revues, variety shows, railroad cars, department stores, hotels, ballrooms and symphonies. (These are among the separate Ascap licenses filed with the Washington Secretary of State, Def. Ex. 7, 8). *In the State of Washington all combined pay zero.*

Even within the broadcasters the consent decree falls far short of providing any so-called equal treatment. Why, for example, can Ascap hire lawyers, monitors, etc., and bring infringement suits against 11 small radio stations as they did in these proceedings, and not even bother big network affiliated radio and TV stations? For just one example, KVOS-TV, a CBS network affiliate, wasn't sued, and is not licensed (R. 31, Admission Nos. 8, 9, 10). CBS owns Columbia Records, Inc., one of the largest recording companies in the United States (R. 31, Admissions Nos. 12, 13).

Why is it the networks, movie exhibitors, background music users, jingles, etc., are cleared at the source, but not broadcasters? The answer to why these and the other flagrant abuses previously related exist is because Ascap was formed in 1914 before broadcasting came into existence.

The broadcasters were not a party to the consent decree, were not consulted when it was entered, and cannot request that it be amended. *U.S. v. Ascap,* 331 F.2d 117 (2d Cir. 1964). When the government and Ascap entered into the decree the government did not

protect the broadcasters. Just as the *Alden-Rochelle* and *Witmark* cases proved it had not protected the movie industry.

Even though Ascap had "only" the non-exclusive license rights it still has today, the movie industry prevailed in the *Alden-Rochelle* and *Witmark* cases. Appellees say those cases are only of historical interest because the *Alden-Rochelle* decree was vacated. Of course it was—after the consent decree was amended in 1950 to conform to the findings of the court. It prohibited Ascap from ever "collecting any monies from, or negotiating with any motion picture theatre exhibitor . . ." (Para. IV. E). It compelled clearance at the source, which is done on a competitive basis, rather than the old abuse of licensing on gross receipts or number of seats. The theatre owner still pays Ascap, but by purchasing a competitively priced film, which he can take or leave on price alone. It wasn't the consent decree that produced this right. It was anti-trust litigation, just like this action, and which the broadcasters were expressly invited to bring by the Second Circuit Court of Appeals. *United States v. Ascap*, 331 F.2d 117 (1964). As the Supreme Court said about the consent decree, private litigants simply are "not bound by government litigation." *Sam Fox Publishing Co. v. U.S.*, 366 U.S. 604 (1961).

The consent decree has not changed much of anything for the broadcasters. Prior to 1941, Ascap charged broadcasters a percentage of their gross under a blanket license. Out of the over 5,000 radio stations, over 98

per cent are still paying on a blanket license on a percentage of their gross. What has changed? The "per program" license is window dressing. Their attempts to amend the decree have failed.

The whole concept of the consent decree is wrong. It substitutes a fantastically cumbersome procedural process that, for the average broadcaster, has accomplished nothing. The alternatives as stipulated are impossible.

For broadcast performance rights there has *never* been competition. What Congress feared when it passed the Copyright Act of 1909 happened just five years later when Ascap was formed in 1914. Copyrights were compounded one on the other and the pooled combination came into being.

The trial court missed the whole point in supposedly "balancing the equities" and finding no other system would work. The reason another system has not worked is because the consent decree will not allow a natural system to evolve. The Justice Department and Ascap have been allowed to substitute their own judgment and now the trial judge has said he, too, knows what will or will not work, and what is best for the public.

The only way performance rights for radio and TV use can find their value—so that "Easter Parade" can be selected and its composer remunerated according to its worth, and "A La Cubana" find its deserving repose—is for this court to free the performing rights to the

music as Judge Leibell did in *Alden-Rochelle.*

As each new radio station comes on the airways to try to please its listeners, it finds itself with very few sponsors. It plays a great deal of music and has only a few commercials. Consequently, it pays Ascap relatively little. As the station builds an image and an audience, it has more commercials and plays less and less music. The *less* music it has time for, the *more* it pays for the music. This is the stigma of the consent decree.

We hope this court will give this station the opportunity to pay for only the music it needs, and to do its own bargaining for it, rather than the Justice Department, Ascap, or even a Federal Judge.

Finally, appellant cannot put it more strongly than to state that it defies the appellees—or anyone for that matter—to distinguish rationally the following cases and their rulings from the present case: *Associated Press v. Taft-Ingalls Corporation,* 340 F.2d 753 (6th Cir. 1965); *Hazeltine Research, Inc., v. Zenith Radio Corporation,* 291 F. Supp. 51 (N.D. Ill. 1965); *United States v. Loew's, Inc.,* 371 U.S. 38 (1962); *M. Witmark & Sons v. Jensen,* 80 F.Supp. 843 (D. Minn. 1948); *Alden-Rochelle, Inc., v. Ascap,* 80 F.Supp. 888 (S.D.N.Y. 1948).

The appellant did not cite the *Associated Press* case in its opening brief because appellant's counsel did not discover the case before the brief was printed. Appellant

submits that the case is exactly comparable to the present case on the anti-trust issues, just as the *Hazeltine* case is.

In the *AP* case the court, at page 756, summarized the issue of that case *and this one* thusly:

> "This AP policy and practice of 'tying' four wire services together in a single 'package' and requiring the appellant to take and pay for four wire services in order to receive any one of them is the principal issue on the appeal."

AP sued the subscriber newspaper for breach of contract for failure to pay fees for the AP news services. The newspaper, as in the present case, defended alleging violation of the anti-trust laws. The district court held for AP and awarded damages. The Circuit Court reversed, stating, at page 762:

> "Yet the record clearly established that AP required appellant to continue to subscribe and pay for three wires which appellant did not want and need, in order to receive a fourth wire which it considered essential, and thereby forced appellant to give up its independent judgment as to whether to subscribe to the three unwanted and unneeded services. This is one of the situations which is 'an object of anti-trust concern.' *United States v. Loew's, Inc., supra,* 371 U.S. 38, 44-45, 83 S. Ct. 97, 102."

The court further pointed out that the practice of packaging news services had been adhered to consistently by AP since 1935. The mere fact that no one challenged it for thirty years is inconsequential, contrary to what the appellees say.

Note that exact similarity of the cases. Ascap require broadcasters to subscribe to all of the compositions i

ts repertory in order for a station to receive any one of them. As the testimony at the trial showed and the stipulated facts established beyond question, the radio station KIXI needs and uses only a small number of carefully selected popular standards. It should not be forced by Ascap to give up its independent judgment and subscribe to unwanted and unneeded compositions such as rock and roll, country-western, or symphony. As before stated, appellant should not be required to allow Ascap, the appellees, the Justice Department or a federal judge to force it to take and pay for unwanted and in many cases inferior music.

Respectfully submitted,

Ronald A. Murphy
Attorney for Appellant
K-91, Inc

CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

Ronald A. Murphy
Attorney for Appellant

APPENDIX A

Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951)

Appellees cite this case for the proposition that a nominal or marginal violation of the anti-trust laws will be subordinated to the copyright privilege. A simple reading of that case will demonstrate that the Court found there was *no* violation of the anti-trust laws, that, in fact, nothing of any consequence regarding anti-trust matters even took place in the United States, that the defendants did not have this defense in mind when they infringed, and that it was not even originally alleged as a defense to the infringement action (Footnote 32, page 106).

Clearly the *Catalda* case has no applicability to this case, where the anti-trust aspects of the case were asserted and emphasized from beginning to end and are hardly marginal. In addition, even if there were no anti-trust aspects to the present case at all, appellant should prevail under the teachings of the many cases cited by appellant that the abuse of a copyright prevents further exploitation of it by successful infringement actions.

Automobile Workers Union v. O'Brien, 339 U.S. 454 (1950)

This is a case dealing with the National Labor Relations Act and has absolutely no application to the present case. Appellant takes no issue whatsoever with its holding. The case involved a statute of the State of

Michigan that was held invalid because it directly "conflicts with the federal Act" in several respects, such as shortening the time for a strike notice from the federally required sixty days to twenty days, and requiring a majority authorization of the strike.

The case arose in the state courts to test the validity of the state act. When Ascap attempted to test the copyright Protection Act in the State of Washington, it was thrown out of court for having "unclean hands" on both occasions. *Buck v. Gallager*, 36 F.Supp. 405 (D. Wash. 1940); *Taylor v. State*, 29 Wn.2d 638, 188 P.2d 671 (1948).

The issue of federal supremacy that appellees cite *O'Brien* for in the labor field was settled in the anti-trust field long ago by the Supreme Court in holding that states could validly enact regulations concerning combinations of copyright holders. *Watson v. Buck*, 313 U.S. 387 (1941); *Marsh v. Buck*, 313 U.S. 406 (1941). For obvious reasons, however, appellees would rather that these cases not be cited or discussed, and declined to do so.

***Amalgamated Ass'n of Street Electric Ry. & Motor Coach Employees v. Wisconsin Employment Relations Board*, 340 U.S. 383 (1951)**

This case is almost identical to the *O'Brien* case above, dealing with the federal supremacy of the National Labor Relations Act over a state statute that directly conflicted with it. Regarding the right to strike ". . . Wisconsin seeks to abrogate that right altogether

nsofar as petitions are concerned." The statute would iave altered the federal procedures of collective bar-;aining, and declared certain matters to be outside the cope of collective bargaining that the federal act re-quired to be subject to collective bargaining.

***nterstate Hotel Co. of Nebraska v. Remick Music Corp.*, 157 F.2d 744 (8th Cir. 1946), cert. denied, 329 U.S. 809 (1947)**

Although the quotation set forth from this case in ippellee's brief would appear to be quite favorable vhen read out of context, a reading of the entire case lemonstrates its lack of application. This is primarily o because Ascap was not involved at all. If it weren't or Ascap's total dominance in the case presently before he Court there would be no case at all here either. Thus in *Remick* the Court said:

> "The answer to this contention is that the Society is not a party to the present suit, has no interest in the copyrights infringed [even the performance rights] and has not engaged in the transaction of any business in the State of Nebraska at any time material to the issues here." 157 F.2d at 474.

***eo Feist, Inc. v. Demarie*, 16 F.Supp. 827 (W.D. La. 1935)**

This case is again quoted quite out of context and vithout stating the applicable facts. It involved an in-ringement suit against a dance hall. Louisiana had a tatute that did not deal with infringements at all, but nly with royalties. The Court held the statute in no vay applicable to the case and expressly did not con-ider the constitutionality of the act.

> "Had the plaintiffs sought to exact the payment of royalties or rentals as a condition of permitting performance of the copyrighted compositions, or demanded therefor as such, then the case might fall within the language of the statute, except for the fact that it applies where such demands are made on copyrighted music books, recorded music for mechanical reproduction, or radio programs, none of which are involved in this instance." 16 F.Supp. at 828.

And at page 828:

> "I am also of the opinion that the statute cannot apply to this case, which was filed in 1933, long before the act of the legislature was passed, for it will not be presumed that it was intended to operate retroactively."

***Leo Feist, Inc., v. Young*, 138 F.2d 972 (7th Cir. 1943)**

Here again appellee's brief quotes out of context Earlier in appellee's brief they admit that the Washing- ton statute is a police power statute, not merely ะ revenue raising statute.

> "We are dealing, after all, with an anti-monopol statute—19.24.060 subjects the music business to th police power of the state . . ." (Appellees' Brief p. 28.)

As pointed out in the opening brief of appellant pages 102-103, the Wisconsin statute was held not t be a defense because the statute was a licensing statut ". . . not relevant or material to the issue presented b the complaint" (138 F.2d at 976). If the Wisconsi statute had not been only a revenue raising statute

". . . collateral to the cause of action and certainly not directly related to it . . ." the Court would have held its noncompliance by the plaintiffs as a valid defense to the infringement action.

Shenandoah Valley Broadcasting, Inc., v. Ascap, 331 F.2d 117 (2d Cir. 1964), cert. denied, 377 U.S. 997 (1964)

The *Shenandoah* case is cited by appellees apparently to establish that the consent decree was again amended in 1950 to alleviate some of the problems of the consent decree. All the *Shenandoah* case does is emphasize the inequities of the Amended Final Judgment of 1950. It was amended in 1950 to correct the abuses Ascap had been perpetrating in the movie industry as brought out in the *Alden-Rochelle* and *Witmark* cases. The 1950 amendment did solve the movie industry problems by forbidding Ascap to be involved and let the competitive market place determine the price and distribution methods of music.

It was in the *Shenandoah* case that broadcasters attempted to petition Judge Ryan for relief from the abuses of the 1950 Amended Final Judgment. The Second Circuit recognized that broadcasters do not have the same advantages enjoyed by others such as the movie industry and the networks:

> "The provisions of Section V(A) and (B) requiring Ascap to license networks and producers in a manner that will relieve their members and customers of the need of obtaining separate licenses seem to have been designed for the benefit of the

networks and the producers, not for that of the television stations, whose rights are specified in Section VII." 331 F.2d at 123.

And the Court concluded on page 124 by holding that broadcasters had no standing to request an amendment to the consent decree, and that if they wanted relief it would have to be in the Courts in an anti-trust action:

> "If appellants' position in fact has the merit under the anti-trust laws which they assert, they have effective remedies available, either by persuading the Department of Justice to apply under Section XVII for a modification of the judgment, or by a private suit which our ruling here in no way affects."

The only way an anti-trust case testing the validity of infringement suits as against copyright and anti-trust abuses can take place is for someone to infringe, wait for the infringement suit, assert the abuses as a defense and counter-claim for injunctive relief and damages. That is what appellant has done. But, by infringing and bringing the matter to litigation, it is called a pirate and unworthy of equitable relief.

***Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173 (1942)**

The *Sola* case is another case dealing with the federal supremacy issue which appellant does not question in the slightest. It is just that the case is not germane to the issues here. However, the case is one dealing with price-fixing in a patent case. The Court held that a local rule of estoppel could not prevent the all-important operation of the policy of the anti-trust laws, and held

[t]hat the defendant-licensee *could* assert as a defense to [a] suit on the license that it included a price-fixing clause [i]n violation of the anti-trust laws, and contrary rules,

> ". . . must yield to the Act's declaration that such agreements are unlawful, and to the public policy of the [Sherman] Act which in the public interest precludes the enforcement of such unlawful agreements. Cf. *Morton Salt Co. v. G. S. Suppigger Co.*, 314 U.S. 488, 492, 493, 86 L.ed. 363, 365, 366, 62 S. Ct. 402." 317 U.S. at 177.

APPENDIX B

Since the judgment was entered by the trial court, Ascap has threatened appellant, through counsel, that if appellant does not take a license retroactive to 1959 it will be sued for additional infringements amounting to thousands and thousands of dollars. Therefore, appellant applied for a current license.

However, if appellant pays fees to Ascap, it will, of course, be in violation of the Washington law. And, if it wins this litigation, it should be entitled to three times that sum of money in anti-trust damages. The trouble is that Ascap, being a non-profit association, will have distributed the money on a formula that is set up so that it is impossible to trace to the Ascap individual members, and would be nearly impossible for appellant to recover.

To remedy this dilemma of possibly throwing money away, and in violation of the Washington law at the same time, appellant has offered Ascap's counsel to place the money in trust or escrow in a bank, and even in the court registry. Whoever prevailed in the litigation would get the money, and in the meantime appellant would not be violating the Washington law. The check has been written and is being held by counsel.

To date Ascap and appellees have refused to issue appellant a license unless appellant pays all back fees, from January 1, 1959, to the present, directly to Ascap in cash. Lacking the money, Ascap threatens more litigation. As usual, the threats and intimidations have pre-

ailed and, as before mentioned, appellant has at this ,riting drawn a check to pay Ascap in cash over $26,000 1 fees, much of which is payment for music appellant oes not need or want.